

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE CITY OF MINNEAPOLIS

City of Minneapolis, Petitioner, v. Todd Lappegaard, Respondent.	FINDINGS OF FACT, CONCLUSIONS AND RECOMMENDATION
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The above matter came on for hearing before Administrative Law Judge Manuel J. Cervantes (ALJ) commencing at 9:30 a.m. on January 28, 2010, at the Office of Administrative Hearings, 600 Robert Street North, St. Paul, MN 55164-0620, pursuant to a Notice and Order for Hearing, filed January 4, 2010. Trina Chernos, Assistant City Attorney, appeared on behalf of the City of Minneapolis (City). Karin E. Peterson, Esq., appeared on behalf of Todd Lappegaard (Respondent); who was present. The hearing record closed on February 8, 2010, with the receipt of the parties' written memoranda of law.

STATEMENT OF THE ISSUE

Whether the City of Minneapolis has demonstrated, by a preponderance of the evidence, that Respondent's conduct on April 30, 2009 constituted malfeasance, willful neglect, or bad faith and hence, supports the City's decision to decline to defend or indemnify the Respondent, a former Minneapolis Police Officer, under Minn. Stat. § 466.07.

The Administrative Law Judge finds that the City has met its burden of proof and that its decision to decline to defend or indemnify the Respondent was proper.

Based on the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent has been a Minneapolis Police Officer for the past seventeen years.¹ Respondent was in uniform and on duty on the evening of April 30, 2009, when he executed the arrest of Rolando Ruiz (Ruiz).²

2. At approximately 11:50 p.m. on April 30, 2009, Respondent pulled into a parking lot on the north side of the Minneapolis Police Second Precinct Station. As he was exiting from his squad car (squad), Respondent heard a crashing noise coming from another police parking lot located on the west side of the precinct building. He saw Ruiz³ throwing a landscaping brick at the windshield of a personal vehicle belonging to Respondent's co-worker.⁴

3. Respondent immediately re-entered his squad, radioed for backup, and proceeded south out of the lot and made a right turn westbound onto 19th Avenue NE in front of the station. Respondent came upon Ruiz immediately. Ruiz was proceeding south; away from the damaged vehicle.⁵ Ruiz was stopped by Respondent's squad in the middle of the street. Ruiz, standing directly in front of the car, placed both hands in plain view on the hood of Respondent's squad.⁶ Ruiz was calm and relaxed, his hands were on the squad, and there was no evidence that Ruiz was tense.⁷ Respondent, still in the squad, turned on his squad light bar, thereby engaging the in-squad video camera. Respondent then exited the squad.⁸ The squad's windows were closed.⁹

4. It took two seconds from the point when Respondent closed his squad door to the point when Respondent was standing directly behind Ruiz and engaging a taser.¹⁰ Respondent gave no verbal commands.¹¹ During this period, the only movement of Ruiz was the turning motion of his head as he watched the Respondent move around behind him. Ruiz maintained the same position throughout, keeping his hands on the hood the entire time. Ruiz did not attempt to flee, made no aggressive gestures toward Respondent, did not swear at Respondent nor offer any resistance.¹²

¹ Testimony of Respondent. He was terminated from his job a week before the hearing in this matter.

² Test. of Respondent, Exs. 9, 11; Respondent's case report.

³ Exs. K, 11. Respondent knew Ruiz from earlier events that evening when Ruiz was arrested for illegal drug possession. Ruiz assisted Minneapolis Police with an illegal drug buy that later that same evening.

⁴ Test. of Respondent, Exs. J., 11. Ruiz threw the bricks at the vehicle because he was upset with the police for confiscating about \$400 in his possession when he was initially arrested. He had no way to get home.

⁵ Ex. 11.

⁶ Ex. 9.

⁷ Test. of Deputy Chief Scott Gerlicher, Ex. 9.

⁸ Test. of Respondent, Ex. 9.

⁹ Ex. 9.

¹⁰ Test. of S. Gerlicher, Ex. 9.

¹¹ Ex. 9.

¹² *Id.*

Ruiz had “given up.”¹³ Ruiz uttered, “What happened?”¹⁴ Without any verbal response, Respondent engaged the taser, forcing Ruiz onto the street.¹⁵

5. Respondent deployed the taser a second time while Ruiz lay face down on the street. One second elapsed between taser cycles.¹⁶ Respondent maintained his balance with his left hand on the squad hood while he was on top of Ruiz while he engaged the taser a second time.¹⁷ Respondent’s supplemental report states, “I immediately gained control of [Ruiz] with this level of force.”¹⁸ There is no mention in the report that there was a struggle.¹⁹ Within sixteen seconds after the start of the video recording, a second officer appeared to assist Respondent.²⁰ For ten of the sixteen elapsed seconds, Ruiz was subjected to taser charges.²¹ There is no credible evidence that Ruiz attempted to roll over onto his back or otherwise attempt to obstruct his arrest.²² There is no evidence that the second officer made any verbal commands to Ruiz while he lay on the street. The only audible sound was of Ruiz screaming in pain.²³

6. Respondent’s case report contains no detailed or comprehensive explanation as to why force was required relative to Ruiz’s arrest. The only reference to resistance in the report is under the category titled, “Personal Description, Type of Resistance Encountered,” where it states, “[Ruiz was] Tensed.”²⁴

7. There is no reference in Respondent’s report that Ruiz was attempting to flee; that he was fearful Ruiz was going to attack him; that Ruiz had a history of violence; that Ruiz had slammed his hands down on the hood; or that Ruiz was swearing at him as testified to by Respondent at the hearing.²⁵

8. It did not occur to Respondent that no use of force was an option on this occasion.²⁶ Respondent had many options other than the use of force to effectuate the arrest of Ruiz, but Respondent did not consider them.²⁷ Respondent could have mitigated the risk to himself by simply waiting for backup.²⁸

¹³ Test. of S. Gerlicher, Ex. 9.

¹⁴ Ex. 9.

¹⁵ *Id.*

¹⁶ Test. of S. Gerlicher and Officer Grobove, Ex. 10.

¹⁷ Test. of Respondent; Ex. 9, 10.

¹⁸ Ex. 11.

¹⁹ *Id.*

²⁰ Ex. 9.

²¹ Test. of S. Gerlicher.

²² Ex. 9.

²³ *Id.*

²⁴ Ex. 11.

²⁵ *Id.*

²⁶ Test of Respondent.

²⁷ Test. of S. Gerlicher.

²⁸ Test. of Officer Grobove.

9. A copy of the video recording of Ruiz's arrest was released to a local television station and viewed publicly in November 2009.²⁹

10. The City of Minneapolis was served with a summons and complaint in November 2009 in the matter of *Rolando Demetrio Ruiz v. City of Minneapolis and Todd Lappegaard* wherein Ruiz asserts, among other causes of action, that Respondent used excessive force.³⁰

11. The City denied Respondent's request for his defense and indemnification in the above matter.³¹ Respondent requested a contested case hearing and the City issued a Notice and Order for Hearing, setting this matter on for hearing on January 28, 2010.³²

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the City have jurisdiction pursuant to Minn. Stat. §§ 14.55 and 466.07.

2. The Respondent was given notice of the hearing in this matter and the City has complied with all substantive and procedural requirements of statute and rule.

3. Minn. Stat. § 466.07 specifies that subject to certain limitations set forth in section 466.04 (relating to maximum liability limits),

[A] municipality or an instrumentality of a municipality shall defend and indemnify any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee: (1) was acting in the performance of the duties of the position; and (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

4. Officers are trained to use the least amount of force necessary to gain control and the standard is based on how a reasonable officer would act under the circumstances.³³ The potential for a threat is not enough to justify the use of force.³⁴

²⁹ Test. of S. Gerlicher.

³⁰ Ex. 6.

³¹ Ex. 8.

³² The ALJ reserved ruling on the admissibility of Respondent's Ex. N. based on the City's objection that it contains double hearsay and that the City was deprived of the opportunity to cross-examine the affiant therein. Petitioner's objection is overruled; Exhibit N is received because its probative value outweighs its prejudicial effect.

³³ Test. of S. Gerlicher and Officer Grobove.

³⁴ *Id.*, see. e.g., *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009) (where an officer's argument that two glass tumblers "could" be used as weapons and the subject "might" kick the officer "is hardly a description of an officer in fear of being physically attacked").

5. Officers are trained to reassess whether a threat exists before initiating a second round of use of force.³⁵ Even if the use of force was found necessary, with only one second between taser cycles, Respondent did not adequately assess or sufficiently deliberate as to whether a second taser cycle was necessary or appropriate.³⁶

6. Minneapolis police officers are trained relative to and are guided by policies relating to the threatened use of force and the authorized use of force. The City's MPD Policy 5-304 relating to Threatening The Use of Force states,

As an alternative and/or the precursor to the actual use of force, sworn MPD employees may verbally announce their intent to use force. Sworn employees may display an authorized weapon as a threat of force. The threatened use of force shall only occur in situations that a sworn employee reasonably believes may result in the authorized use of force....³⁷

7. Respondent failed to follow MPD Policy 5-304 by employing the less aggressive tactic of threatening to use force prior to the use of force by either verbally announcing his intent to use force or displaying an authorized weapon as a threat of force.³⁸

8. The City's MPD Policy 5-303 relating to Authorized Use of Force states,

Minn. Stat. § 609.06, subd. 1, states, When authorized..., reasonable force may be used upon or toward a person of another without the other's consent when the following circumstances exist or the actor reasonably believes then to exist:

When used by a public officer or one assisting a public officer under the public officer's direction:

- In effecting a lawful arrest;³⁹

In addition to Minn. Stat. §609.06, sub. (sic) 1, MPD policies shall utilize the United States Supreme Court decision in Graham vs Connor as a guideline for reasonable force.

The Graham vs Connor case references that:

³⁵ Test. of S. Gerlicher and Officer Grobove.

³⁶ Test. of S. Gerlicher.

³⁷ Ex. Q.

³⁸ Respondent cites the approval of the reported use of force to his superiors in his CAPRS police report. Little weight is accorded this fact. Approval was given based solely on Respondent's written/verbal reports. His superiors were not aware of the video when approval was given the day after the incident and neither supervisor testified at the hearing.

³⁹ Ex. 5.

‘Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including:

- The severity of the crime at issue,
- Whether the suspect poses an immediate threat to the safety of the officers or others, and
- Whether he is actively resisting arrest or attempting to evade arrest by flight.

The ‘reasonableness’ of a particular use of force must be judged from the perspective of **the reasonable officer** on the scene, rather than with the 20/20 vision of hindsight. (Emphasis original.)

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.’

Authorized use of force requires careful attention to the facts and circumstances of each case. **Sworn MPD employees shall write a detailed, comprehensive report for each instance in which force was used.**⁴⁰ (Emphasis supplied.)

9. The City has demonstrated that the crime at issue, while serious, was not severe in that it was not an act of violence toward a person but against property; that Ruiz did not pose an immediate threat to others or specifically, to Respondent; and that Ruiz was not actively resisting arrest nor did he attempt to flee.

10. In considering the cautionary language which addresses the fact that officers are often required to make split-second decisions prior to acting, the Respondent in this case had time to be more deliberative: 1) because of his proximity to the police station; 2) because Ruiz was not exhibiting aggressive behavior; 3) because Ruiz was not attempting to flee; and 4) because Ruiz had given up. Respondent could have waited for backup, could have given verbal commands upon leaving his squad, and could have threatened the use of force before actually employing the use of force.

11. Doubt is raised as to Respondent’s credibility because there is no reference in Respondent’s report that Ruiz had slammed his hands down on the hood; that Ruiz was swearing at him; that Ruiz had a history of violence; that Respondent was fearful Ruiz was going to attack him; or that Ruiz was attempting to flee as testified to by Respondent at the hearing. There is no detailed comprehensive report supporting the necessity to use force as required by MPD policy.

⁴⁰ Ex. Q.

12. Minn. Stat. § 466.07 does not define “malfeasance,” but guidance can be found in other Minnesota law. “Malfeasance” is defined in two other Minnesota statutes. Minn. Stat. § 351.14, subd. 2 (relating to resignations, vacancies, and removals from public office), defines “malfeasance” as “the willful commission of an unlawful or wrongful act in the performance of a public official’s duties which is outside the scope of the authority of the public official and which infringes on the rights of any person or entity.” Minn. Stat. § 211C.01, subd. 2, (relating to the recall of elected state officials), defines “malfeasance” as “the intentional commission of an unlawful or wrongful act by a state officer ... in the performance of the officer’s duties that is substantially outside the scope of the authority of the officer and that substantially infringes on the rights of any person or entity.”

13. Minn. Stat. § 466.07 does not define “neglect of duty,” but it has been defined in case law as “a careless or intentional failure to exercise due diligence in the performance of an official duty.”⁴¹

14. Under the circumstances of this case, Respondent’s duty on April 30, 2009, was to take Ruiz into lawful custody for the offense of criminal damage to property, by using the least amount of force necessary to gain control, not to subject him to an unprovoked tasing. Respondent failed to exercise due diligence in the arrest of Ruiz and hence, was neglectful of his duty as an officer.

15. Minn. Stat. § 466.07 does not define bad faith, but it has been defined in case law as “the commission of a malicious, willful wrong.”⁴² “Malice” has been defined as “the intentional doing of a wrongful act without legal justification or excuse.”⁴³

16. Rather than deliberating on what was the reasonable thing to do under the circumstances, Respondent’s hasty action makes clear what he wanted to accomplish, it was to punish Ruiz for the crime he had just committed against Respondent’s co-worker’s car. Respondent’s act was malicious and in bad faith.⁴⁴ After seventeen years of experience as a police officer, Respondent knew this conduct was wrong, but acted against his better judgment anyway.

17. Under the circumstances of this case, the elements of malfeasance, neglect of office, and bad faith have been met. The conduct of Respondent of applying force on April 30, 2009 to Ruiz, who had already given up, was outside the scope of training and practice. The force used was unnecessary, unreasonable, and malicious.⁴⁵

⁴¹ *In re Olson*, 211 Minn. 117, 117, 300 N.W. 398, 400 (1941).

⁴² *Mjolsness v. Riley*, 524 N.W. 2d 528, 530 (Minn. App. 1994), citing *Tatro v. City of Minneapolis*, OAH 11-6010-15156-3.

⁴³ *Smith v. Morales*, 2008 WL 4909630 *2 (Minn. App.), citing *Rico v. State of Minnesota*, 472 N.W.2d 100, 107 (Minn. 1991), (defined “malicious”, in the official immunity context, as when an official intentionally commits an act that he or she has reason to believe is prohibited).

⁴⁴ *Id.*

⁴⁵ Test. of S. Gerlicher.

18. The City has demonstrated by a preponderance of the evidence that its decision not to defend or indemnify the Respondent was proper, under Minn. Stat. § 466.07.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the Minneapolis City Council AFFIRM the City's decision not to defend or indemnify the Respondent, Todd Lappegaard, in connection with *Rolando Demetrio Ruiz v. City of Minneapolis and Todd Lappegaard*.

Dated: February 25, 2010

s/Manuel J. Cervantes

MANUEL J. CERVANTES
Administrative Law Judge

Reported: Digital Recording

NOTICE

This report is a recommendation, not a final decision. The Minneapolis City Council will make the final decision after a review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations. The parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis, MN 55415-1382, telephone (612) 673-3136, to learn when the City Council will consider this matter and whether the Respondent will have an opportunity to present argument to the City Council concerning this recommended decision.

The City is requested to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The primary issue in this case is whether the City should defend and indemnify the Respondent in the state court action filed by Ruiz. Minn. Stat. § 466.07 provides for the defense and indemnification of employees as long as the employee is "not guilty of malfeasance in office, willful neglect of duty, or bad faith." The City argued that defense and indemnification should be denied under all three grounds. The ALJ agrees.

The operative terms are not defined in the defense and indemnification statute. But other Minnesota law defines "malfeasance" as "the willful commission of an unlawful or wrongful act in the performance of a public official's duties which is outside the scope of the authority of the public official and which infringes on the rights of any person or entity." Similarly, "malfeasance" has been defined in another Minnesota statute as "the intentional commission of an unlawful or wrongful act by a state officer ... in the

performance of the officer's duties that is substantially outside the scope of the authority of the officer and that substantially infringes on the rights of any person or entity."

From the above authorities, it is clear that malfeasance requires that a public officer, in his or her official capacity, intentionally acts wrongfully and/or unlawfully outside the scope of the officer's authority which substantially infringes on the rights of another. In applying this standard to the circumstances of the instance case, it is clear that the City has demonstrated malfeasance on the part of Respondent.

It is not disputed that Respondent was on duty on the evening of April 30, 2009, when he stopped Ruiz. Respondent exceeded the scope of his duties by using excessive force when less force would have been sufficient and appropriate.

After witnessing Ruiz damage Respondent's co-worker's car, Respondent testified that he gave Ruiz a verbal command to get on the ground and to put his hands behind his back before he engaged the in-squad camera. Respondent's claim does not hold up. It appears from the video that the squad's windows were up and no commands were given while in the car.⁴⁶ If no commands were given while in the squad, then when? No verbal commands were given to Ruiz by Respondent once the video was engaged. The audio portion of the recording captured the closing of the squad door. Only two seconds elapsed from the engagement of the video to the point when Respondent was tasing Ruiz the first time.

Respondent had ample opportunity to use commands before using force. There is no credible evidence that Ruiz was being aggressive toward Respondent, that he was swearing at Respondent, nor did Ruiz attempt to flee.

Respondent stopped Ruiz directly in front of the police station. Respondent was aware that there were numerous officers inside the building. Respondent testified that he had just seen several of them escorting Ruiz out of the west parking lot, and they waved him on before he parked. The circumstances indicate that there were officers within seconds from where Ruiz was stopped. But Respondent did not wait for backup; he did not issue verbal commands; he did not threaten the use of force if Ruiz chose not to comply with commands; nor did he display a weapon to threaten Ruiz in the event of non-compliance. Instead, within two seconds of the stop, Respondent was out of his squad and behind Ruiz. Ruiz did not attempt to resist. The only movement from Ruiz was his head. When Ruiz asked, "What happened?" Respondent said nothing, but immediately tased him. This is not the conduct of an officer who is in fear of being attacked, as Respondent testified. This is the conduct of an officer who was on a mission to punish the man he saw damage his co-worker's car. The video recording makes clear that the Respondent willfully and maliciously tased Ruiz without legal justification. This was the testimony of Deputy Chief Gerlicher. The ALJ reaches the same conclusion. Accordingly, this conduct constitutes malfeasance in office.

⁴⁶ Test. of Respondent.

The City also argued that Respondent neglected his duty to the public by his willful and malicious conduct. “Neglect of duty” has been defined in case law as “a careless or intentional failure to exercise due diligence in the performance of an official duty”.⁴⁷ Under the circumstances of this case, Respondent’s duty on April 30, 2009 was to take Ruiz into lawful custody for the offense of criminal damage to property, not to subject him to unprovoked punishment with a taser. Gerlicher testified as to the significance of the relationship between law enforcement and the public it serves. When police authority is abused, the public’s trust and confidence is diminished. Respondent’s official conduct sends the wrong message to the public, to wit, even if you cooperate with police “gets you tased.”⁴⁸ Abuse of police authority has a chilling effect on the public’s willingness to work with the police in protecting the public. Respondent failed to exercise due diligence in the arrest of Ruiz and hence, was neglectful of his duty as an officer and also violated the public’s trust.

Finally, the City argues that the Respondent acted in bad faith since he intentionally committed a wrongful act without legal justification. In *Mjolsness v. Riley*,⁴⁹ the Court of Appeals defined “bad faith” as “the commission of a malicious, willful wrong.” “Malice” has been defined as “the intentional doing of a wrongful act without legal justification or excuse.”⁵⁰ As previously discussed, Respondent’s tasing conduct was unprovoked. There was no legal justification for the use of force under the circumstances presented. As a seventeen year veteran of the police force, Respondent knew this conduct was wrong, but he pursued it anyway. Accordingly, this conduct was done in bad faith.

Considering all the circumstances in this case and the evidence of record, the ALJ concludes that the City has demonstrated by a preponderance of evidence that Respondent’s conduct in effecting the arrest of Ruiz on April 30, 2009 was done with malfeasance, with neglect of duty and in bad faith.

M.J.C.

⁴⁷ *In re Olson*, 211 Minn. 117, 117, 300 N.W. 398, 400 (1941).

⁴⁸ Test. of S. Gerlicher.

⁴⁹ 524 N.W. 2d 528, 530 (Minn. App. 1994) (a case involving the Minnesota Commitment Act), citing *Tatro v. City of Minneapolis*, OAH 11-6010-15156-3.

⁵⁰ *Smith v. Morales*, 2008 WL 4909630 *2 (Minn. App.), citing *Rico v. State of Minnesota*, 472 N.W.2d 100, 107 (Minn. 1991), (defined “malicious”, in the official immunity context, as when an official intentionally commits an act that he or she has reason to believe is prohibited).